MAY 5 1995

No. 94-1644 and 94-9087

IN THE

Supreme Court of the United States

October Term, 1994

BABY "RICHARD," a minor, by his guardian *ad litem*, Edward J. O'Connell, and JOHN and JANE DOE, Former adoptive parents of the child Richard,

Petitioners,

v.

OTAKAR KIRCHNER, Biological father of the child Richard,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

MOTION FOR LEAVE TO FILE AS *AMICUS* AND BRIEF OF THE GOVERNOR OF THE STATE OF ILLINOIS AS *AMICUS* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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Dated: May 5, 1995

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MOTION OF THE GOVERNOR OF THE STATE OF ILLINOIS FOR LEAVE TO FILE A BRIEF AS *AMICUS* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

The Governor of the State of Illinois, Jim Edgar, respectfully moves this Court to grant leave to file the attached *amicus* brief in support of the petitions for writ of certiorari to the Supreme Court of Illinois. In support of this motion, the Governor states as follows:

1. Consent to file has been respectfully requested of each of the parties. Only Respondent, Otakar Kirchner, refused to consent.

2. As the chief executive officer of Illinois, it is the Governor's responsibility to faithfully execute the laws and public policies of the State. The decision of the Illinois Supreme Court in this case wrongly held that a custody hearing following a failed adoption, provided for by the State pursuant to long-standing precedent and legisla-

tion, violated the federal Constitution. As the State's chief executive, the Governor has a unique interest in the constitutionality of this important procedural protection created by the State for vulnerable children. As stated in the attached brief, the decision below threatens to undermine the integrity of and public confidence in the State's authority to fairly adjudicate adoption and custody disputes. Illinois is not alone in this regard; at least 16 other states have adopted similar procedural protections. The decision below casts a cloud of uncertainty as to the constitutionality of these provisions as well.

3. In addition, the decision below will affect the State's ability to address the sharply increasing number of children born to unmarried mothers and the tens of thousands of children taken into state custody who may ultimately have to be adopted. In the attached brief, the Governor seeks to assist this Court's understanding of how the incorrect Illinois ruling will impede him, as well as other state executives, in responding to these serious societal problems.

4. The Governor's brief provides a broader perspective of the issues implicated by the Illinois ruling than the briefs of the parties. Having shaped and implemented State policy, the Governor is in a better position to assess the decision's legal and societal impact. Unlike the two filed petitions, the attached brief is devoted to such discussion.

WHEREFORE, Governor Jim Edgar respectfully requests leave to file the attached *amicus* brief.

Dated: May 5, 1995

Respectfully submitted,

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BRIEF OF THE GOVERNOR OF THE STATE OF ILLINOIS AS *AMICUS* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS*

The Governor of the State of Illinois, Jim Edgar, respectfully submits this brief as *amicus* in support of the petitions for writ of certiorari to the Supreme Court of Illinois.[1] *Amicus* is the chief executive officer of Illinois,

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[1] On April 5, 1995, John and Jane Doe, the former adoptive parents of the minor child known as "Richard," filed a Petition for Writ of Certiorari. On April 7, 1995, Edward J. O'Connell, the Guardian *Ad Litem* for Richard, also filed a Petition for Writ of Certiorari to the Illinois Supreme Court. This *amicus* brief together with the accompanying motion for leave to file as *amicus* are submitted in support of both petitions. The Petition by the Does will be cited herein as "Doe Pet."; the Petition by the Guardian Ad Litem will be cited as "GAL Pet."; the Appendix to the Doe Petition will be cited as "App."

and is charged with the responsibility to ensure the faithful execution of the laws and public policy of the State.

It is neither correct under the federal Constitution nor the law or public policy of this State to cause the sudden, traumatic transfer of a four-year-old child from the only home he has ever known into the hands of his biological father whom he has never met and his biological mother who gave him up for adoption and set in motion the tragic set of circumstances now faced by Richard and the Does. Yet, because of the Illinois Supreme Court's erroneous interpretation of the federal Constitution and decisions of this Court, just such a transfer of the child in this case took place this past Sunday, April 30, 1995.[2]

Rather, it is the law and public policy of Illinois to provide for custody hearings in cases where court-ordered adoptions are later vacated, to guarantee judicial oversight of the well-being of vulnerable children, who through no fault of their own find themselves at the center of a wrenching controversy. The procedural protection provided by Illinois in this case — a court hearing, the bedrock of our justice system — is intended to ensure that

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[2] Obviously, the Does' actions obeying the court order in this case to transfer Richard has not rendered this appeal moot. *See Eagles v. United States ex rel Samuels*, 329 U.S. 304 (1946) (case not rendered moot after custody was transferred because writ of habeas corpus was granted); *Porter v. Lee*, 328 U.S. 246 (1946) (case not rendered moot where tenant complied with order to vacate); *see also Church of Scientology v. United States*, ___ U.S. ___, 113 S. Ct. 447 (1992) (case is not moot where party complied with lower court's order to transfer documents while appeal was pending); *Maher v. Roe*, 432 U.S. 464, 469 n.4 (1977) (agency's change in policy in compliance with court order while appeal was pending did not render case moot).

when the power and authority of the State is invoked to determine the status and welfare of children such as Richard, this decision-making is conducted fairly, correctly, and in view of all relevant facts. To do otherwise would seriously erode public confidence and acceptance of the State's authority over these critical decisions. The decision by the Illinois Supreme Court, however, eliminates that procedural protection for Richard, based on the wholly mistaken view that the federal Constitution mandates such a result.

If this decision stands, a very real human cost will be exacted upon Richard and the Does — the cost of the Illinois court's error has in fact already been inflicted in some measure by the initial removal of Richard from what he believed was his home. A societal cost will also accrue, as the integrity of the State's decision-making over critical issues such as where a young child will live and grow up is eroded, precisely at a time when there is an ever-increasing demand on the State to take action. Nationwide, over 1.2 million children are born to unmarried mothers each year — an increase of 82 percent since 1980. The number of children supported by the States in foster care has ballooned from 276,000 in 1986 to over 450,000 in 1992. At the same time, the number of adoptions has fallen sharply across the country, from 90,000 in 1970, to less than 53,000 a year today. It is for all of these interests that this *amicus* comes before the Court.

REASONS FOR GRANTING THE WRIT

For over three decades, Illinois law provided a clear and humane process for determining who shall have custody over a child when disputes arise among biological

parents and others with an interest in the child. It was a process grounded in the basic premises of our legal system — namely, ensuring a fair and impartial hearing before judicial decisions are made. It was a process designed to provide an opportunity for all relevant facts to be brought before the court. It was a process that recognized the delicate and profound nature of the court's determinations, and the crushing harm that could be caused vulnerable children in the event of an erroneous decision. The decision below invalidates and eliminates the long-standing Illinois process of holding custody hearings when a sanctioned adoption is later vacated. This ruling is based on the wholly mistaken belief that the federal Constitution, and the decisions by this Court, establish custodial rights in biological parents that precisely coincide with their parental rights and that would be infringed by an evidentiary hearing on the child's best interests.

Yet, the Constitution clearly does not equate parental rights with custody determinations, and in no way limits the right of the State to enact procedural safeguards to ensure that the best interests of children are met in custody proceedings. The irony here is that the Illinois court has invoked the federal Constitution and the fundamental due process guarantees it contains to *deny* the State of Illinois the ability to provide such due process to children in custody disputes arising out of failed adoptions. Such a result cannot stand.

By holding the best interests hearing established under Illinois law as unconstitutional, the Illinois court has not only eliminated the ability of the State to provide basic procedural protections, but has also called into question the constitutionality of similar proceedings in jurisdictions

throughout the country. The controversy and doubt generated by the Illinois decision has already begun, and will lead to an unworkable patchwork of conflicting and contradictory interpretations of the constitutional mandates of this Court.

This confusion alone would be reason enough to grant the requested writ in this case. *Michigan v. Long*, 463 U.S. 1032 (1983) (finding review appropriate where state supreme court made erroneous interpretation of federal Constitution). The fact that this confusion arises in the context of judicial determinations as to the lives and well-being of infants and young children provides an even more compelling reason for a swift and clear correction by this Court of the fundamental errors in the decision below. The lack of clarity and certainty as to the procedural protections for making these difficult decisions will undermine the compelling State interests in promoting adoptions, assuring unmarried mothers of the care and protection their children will receive, and guaranteeing adoptive parents who come forward to provide homes for these children fairness and an opportunity to be heard. The human cost of the error here is real and tragic, and underscores the urgent need for consideration of this case by this Court.

I.
THE ILLINOIS SUPREME COURT IS WRONG IN CONCLUDING THAT IT IS UNCONSTITUTIONAL FOR THE STATE TO PROVIDE FOR A CUSTODY HEARING FOLLOWING A VACATED ADOPTION ORDER

The effect of the writ of habeas corpus issued "forthwith" by the Illinois Supreme Court on January 25,

1995, was to order the immediate transfer of Richard from the Does, with whom Richard had lived all of his life, to Otakar Kirchner, his biological father, and Daniella Kirchner, his biological mother who had given him up for adoption. This judicially ordered transfer, in the Illinois court's view, was to take place without any further hearings by the state courts, fact-finding as to the circumstances of such transfer or Richard's future, or any regard for the effect on Richard.[3]

This clearly was *not* the intent of the State of Illinois, which had in place procedural protections providing for a hearing at which the best interests of Richard — including the parental rights and interest of his biological father and the actions of and care provided by the Does — could be heard, reviewed and considered. Prior to the decision here, Illinois statutory and case law provided for a

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[3] After the January 25, 1995 order by the Illinois Supreme Court, the Does and Kirchner were engaged in a lengthy dispute as to the manner in which Richard was to be moved from his home with the Does over to Kirchner, which led to a sudden, painful transfer of Richard on April 30, 1995. Janan Hanna, *"Richard" A Baby No More, But The Talk Drags On*, Chi. Trib. Mar. 16, 1995, at 4; Andrew Fegelman, *Kirchner Won't Wait For Custody; Father of Richard Frustrated By Delays*, Chi. Trib., Apr. 11, 1995, at 1; Janan Hanna, *Baby Richard Tug-Of-War Gets Messier; Each Side Asks Court To Intervene*, Chi. Trib., Apr. 18, 1995, at 1; Bob Greene, *Wrenching Day For "Richard"; "Don't Send Me Away Boy Begs"*, Chi. Trib., May 1, 1995 at 1. All of this has occurred without the benefit of a judicial forum in which to air and resolve these disputes, because the decision below invalidated further judicial proceedings concerning the custody of Richard. The obvious harm and rancor that has ensued in this case, with *no* ability by the State to provide a forum for resolving disputes, clearly demonstrates the urgent need for continued judicial hearings when an adoption is vacated.

hearing at which custody decisions could be properly made, even though parental rights were not terminated. Thus, in the long-standing precedent of *Giacopelli v. Florence Crittenton Home*, 16 Ill. 2d 556, 158 N.E.2d 613 (1959), the Illinois Supreme Court itself recognized that where, as here, a mother has been found to have relinquished her parental rights and placed a child for adoption, while the father has not, a determination nonetheless must be made as to the child's best interests in deciding custody. This must be based on the evidence presented to a trier of fact (*id.* at 566-67, 158 N.E.2d at 618-19), for, as the Illinois court previously recognized, "[w]e cannot speculate with the life of a child . . ." *Id.* at 566, 158 N.E.2d at 618.

Consistent with these considerations, the Illinois Marriage and Dissolution of Marriage Act (the "Act") clearly sets out judicial proceedings for a hearing to determine the custody of a child, "in accordance with the best interest of the child." 750 ILCS 5/601-602. Kirchner himself has admitted that the prior adoption proceedings in this case did not in any way reach the custody issues raised by the Doe's petition for such a hearing. Resp't Br. in Opp'n to Writ of Cert. at 11-14, filed in *In re Doe*, 159 Ill. 2d 347, 638 N.E.2d 181, *cert. denied*, ___ U.S. ___, 115 S. Ct. 499 (1994) ("the issue of Richard's custody may yet be raised in subsequent litigation, presumably upon filing by the Does of a petition for a custody hearing").[4]

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[4] Illinois further reiterated its public policy of affording the procedural protection of a custody hearing with the enactment of Public Act 88-550, which explicitly codified the precedent under prior law that a custody hearing may ensue following a failed

(continued...)

The decision by the Illinois Supreme Court overrules the prior consistent law of Illinois, based on the court's erroneous interpretation of the federal Constitution and the rulings of this Court. Beginning with its own long-standing precedent, the Illinois court, citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978), ruled "that the holding of *Giacopelli* is clearly unconstitutional," and "stands as an unconstitutional remnant of a bygone era and has no precedential value." (App. at 11a-12a).

The court then went on to evaluate the custody proceeding provided under the Act, "commenc[ing] with a review of the rights afforded unwed fathers by our federal Constitution." (App. at 16a). The conclusion of this "review" is that "fathers such as Otto, whose parental rights are not properly terminated and who, through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity to and do develop this relationship." (App. at 16a-17a). According to the Illinois Supreme Court, the "superior rights of the natural parents to the care, custody

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[4](...continued)

adoption in order to determine the custodial setting that is in the child's best interests. *See* 750 ILCS 550/20 (West 1995 Pocket Part). Provision for such a custody hearing is consistent with the procedure in at least 16 other states and with the express terms of the new Uniform Adoption Act recommended to the states by the National Conference of Commissioners on Uniform State Laws, after long and careful deliberation by family and constitutional law experts from across the country. *See* Doe Pet. at 14-16 & n.5-6; *see also* Mark Hansen, *Fears of the Heart*, 80 A.B.A.J. 58 (Nov. 1994).

and control of their child is the law of the land," (App. at 19a), and these "superior right[s]" mandate that a custody hearing by non-parents may only occur "upon voluntary relinquishment" of the child. (App. at 20a-21a). However, neither the words "voluntary relinquishment," nor any similar requirement appears anywhere in the Illinois statute. This is simply an unsupported gloss derived from a tragically mistaken interpretation of this Court's constitutional jurisprudence.

As explained by Justice McMorrow in her dissenting opinion below, *none* of the five decisions by this Court on the constitutional rights of unwed biological fathers creates the "superior parental rights" asserted by the Illinois majority to eliminate the required custody hearing. *See* App. at 76a-78a (McMorrow, J., dissenting), citing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972); *see also* Doe Pet. at 25-27; GAL Pet. at 26. To the contrary, together these cases establish the constitutional principle that the State may *limit* the rights of unwed biological fathers who do not come forward promptly and establish a relationship with and assume responsibility for a child who is now in the care of others. *See, e.g., Lehr*, 463 U.S. at 261 ("the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds.").

Nowhere is there constitutional precedent for holding that where a biological link is determined to exist, a presumption of "superior rights" is created and the State

is divested of any ability to hold further hearings as to the welfare of the child.

Indeed, the tautology created by the Illinois majority — that an unwed biological father whose parental rights are upheld has immediate and exclusive custody of a child — has no basis in law. Clearly, there are numerous examples where the custodial rights of biological parents are subject to judicial proceedings, without a showing of unfitness so as to terminate their parental rights. Such limitations on the *custodial* rights of parents are constitutionally valid and do not implicate the same concerns as the termination of parental rights. *See Robison v. Via*, 821 F.2d 913, 921 (2nd Cir. 1987) and cases cited therein (it is "well established" that parents may be deprived of custody to protect safety of child); *Newton v. Burgin*, 363 F. Supp. 782 (W.D.N.C. 1973), *aff'd* 414 U.S. 1139 (1974) (considering and upholding state statute providing that state may assume custody of child for a minimum of five days without hearing if deemed to be in best interests of the child). *See also Raboya v. Shrylbman & Assoc.*, 777 F. Supp. 58, 60 (D.D.C. 1991) ("because the statutory scheme for child neglect involves at most a temporary suspension of parental rights, due process only requires that a finding of neglect be based on preponderance of evidence").

The fallacy of the Illinois court's ruling that the presumption of parental rights accorded Kirchner invalidates the State's express interest in a custody hearing on Richard is underscored by the seminal decision in *Stanley*, 405 U.S. 645. There, the State of Illinois' asserted presumption that unwed fathers were unfit resulted in the unconstitutional removal of children, without the benefit of

a hearing, from the custody of their unwed biological father, with whom they had lived all their lives. As this Court noted:

> Procedure by presumption is always cheaper and easier than individual determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Stanley, 405 U.S. at 656-57.[5]

Here, it is the Illinois Supreme Court that has impermissibly applied a presumption for formality — the bare existence of parental rights — to replace judicial procedure with procedure by presumption, and foreclose any inquiry into "the determinative issues of competence and care . . ." This result is clearly contrary to the Constitution and the very rulings of this Court relied on by the Illinois majority, and it "cannot stand."

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[5] In response to concern with delay, such as that expressed by the Illinois Supreme Court here, this Court observed that "the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley*, 405 U.S. at 656.

II.
THE ILLINOIS RULING CONFLICTS WITH THE INTEREST OF THIS STATE, AND THE RULINGS OF OTHER STATES, IN PROVIDING FOR A CUSTODY HEARING WHERE AN ADOPTION HAS FAILED

The result of the decision by the Illinois court is to divest the state trial courts of any ability to hear evidence or make decisions concerning the best interests of a child in determining custodial issues, such as where a child is to live, what visitation may occur, or even the circumstances of the child's transfer from an adoptive home where he may have lived his entire life to a new home with biological parents he has never seen. The Illinois court confuses a decision regarding the termination of parental rights with a decision regarding the child's custody — a decision made every day in courts throughout the land — without implicating parental rights. This distinction, and the procedural hearings afforded by Illinois and other states that recognize this distinction, are rooted in the "present realities" of family life today, where we know that "competence and care" for children does not always coincide with the existence of biological parental rights. *Stanley*, 405 U.S. at 657. The failure of the Illinois Supreme Court to recognize this important distinction has cast a cloud of uncertainty on the statutory provisions in Illinois and other states as well as the adoption process and protection for children in this nation, and has caused real harm and trauma to a small child.

A. The Constitutional Limitations Imposed By The Illinois Court Directly Contradict The Rulings of Other States On This Very Issue

The failure by the Illinois court to distinguish between parental rights and custody determinations, and to deny Richard and the Does an opportunity to be heard on the issue of Richard's custody, is plainly wrong and is directly contradicted by rulings in other states. On March 30, 1995, the Supreme Court of New Mexico, interpreting *Stanley* and its progeny, voided the termination of an unwed father's parental rights but held that "[a] finding that parental rights were improperly terminated does not mechanically result in the award of custody to the biological parents." *In re Adoption of J.J.B.*, No. 21,864, slip op. at 27 (N.M. S. Ct. Mar. 30, 1995). The New Mexico court expressly rejected the ruling by the Illinois court here, observing that:

> The Illinois court seemed to conclude that the child's best interests are defined entirely by the rights of the natural parents when parental rights have been terminated. Thus the court automatically awarded custody of the child to the biological parent. We decline to adopt this bright line approach. We are directed to do otherwise, not only by the letter of the law but also by compassion for the people involved.

Id. Accordingly, the New Mexico court transferred the case for the very custody proceeding that the Illinois court says is constitutionally barred: a hearing by the trial court to determine "the delicate balance of interests in the natural parent-child relationship as measured against custody in

other persons; such a decision cannot be based upon the written appellate record." *Id.* at 32.

In summary, the New Mexico court emphasized that "the trial court should not be bound by the traditional bright line solution of awarding the child like a trophy to whichever party wins the litigation. The child's best interests may be served by applying more equitable principles." *Id.* at 33. This ruling is consistent with that of several other states in which the courts have interpreted the federal Constitution to recognize the distinction between the termination of parental rights and custody determinations, and holding that a trial court, hearing all issues, is where custody decisions are to be made, based on the best interests of the child. *In re Custody of C.C.R.S.*, 1995 WL 33091 (Colo. Jan. 30, 1995). Contrary to the Illinois ruling here, these courts hold that there is *no* constitutional right to custody of a child, and that any preferential considerations accorded a biological parent may be overcome following a full consideration of the child's best interests. *See, e.g., In re Baby Boy C.*, 630 A.2d 670 (D.C. App. 1993), *cert. denied*, ___ U.S. ___, 115 S. Ct. 58 (1994); *Lemley v. Barr*, 343 S.E.2d 101 (W. Va. 1986); *Sorentino v. Family & Children's Society of Elizabeth*, 74 N.J. 313, 378 A.2d 18 (1977).[6]

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[6] The very nature of the psychological and emotional harm to Richard, resulting from an order to transfer custody to people he has never known, warrants a hearing. Psychologists have commented on the grave effects of a transfer of custody on a child, revealing that:

> Continuity of relationships, surroundings, and environmental influence are essential for a child's

(continued...)

B. The Illinois Decision Undermines The State's Compelling Interests To Provide For A Custody Hearing

In the absence of a custody hearing, as provided by the Act, Illinois is deprived of the procedural protections granted in states like New Mexico to ensure its citizens of fairness, compassion and the equitable weighing of the delicate and difficult balance in the competing interests at stake. Indeed, this case itself demonstrates the compelling state interest in such procedural protections. As evidenced by the fundamental factual discrepancies between the majority opinion and the two dissents, there is simply no resolution, nor has any trier of fact reached an evidentiary determination, as to the critical facts bearing upon the future welfare of this four-year-old child; these issues were simply not the focus of inquiry in the initial adoption proceedings. *Compare* App. at 2a-8a (majority

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[6](...continued)

> normal development. Since they do not play the same role later in life, their importance is often underrated by the adult world.
>
> Physical, emotional, intellectual, social, and moral growth does not happen without causing the child inevitable internal difficulties. The instability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from external sources. *Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones.*

J. Goldstein, A. Freud, A. Solnit, *Beyond the Best Interests of the Child* 31-32 (1979) (emphasis added). Indeed, the traumatic effects of a change in custody cannot be underestimated, as some children experience insomnia, weight loss, and withdrawal. David Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 Mich. L. Rev. 477 (1984).

summary of facts) *with* App. at 40a-43a (McMorrow, J., dissenting) (dissent's correction of facts). *See also* App. at 35a (Miller, J., dissenting) ("The majority's efforts to resolve these questions of fact in this opinion are premature . . ."). The precipitous and abrupt decision by the Illinois majority, which divested the state trial courts of *any* procedure for hearing evidence and overseeing the remainder of this case, consigned the fate of a small boy to the disputes and hostilities of opposing parties with no available forum to provide a reasonable resolution based on the facts.

The custody hearing provided for under the Act clearly affords all parties to a failed adoption procedural protections and ensures that judicial decisions about where a child would live could be made fairly and correctly, in view of all the evidence. The "superior rights" of the biological father, which so concern the majority below, are plainly acknowledged in the terms of the Act itself and must be taken into consideration in determining the child's best interests at the custody hearing.[7] Conduct of "present or proposed" custodians that affect their relationship with the child are within the scope of the hearing. 750 ILCS 5/602(b). Thus, the majority's repeated concerns regarding "child abductions" are answered, not obviated, by granting a full hearing on the child's best interests. (App.

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[7] The Act specifically mandates in its definition of the best interests of the child that "[u]nless the court finds the occurrence of ongoing [domestic violence] abuse . . . the court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child." 750 ILCS 5/602(c) (West 1995 Pocket Part).

at 21a). Most importantly, the State's interest in providing a hearing for the full development of relevant facts before a trier of fact mandates that a custody hearing be held.

The Illinois decision that such a hearing is constitutionally barred fuels and perpetuates the turmoil in Illinois, where a challenge has now been mounted to the new statute enacted last year. Andrew Fegelman, *"Baby Richard" Law Faces First Test in Custody Fight*, Chi. Trib., Apr. 28, 1995, at A1, A12. Review by this Court is the only solution to this ongoing controversy. Moreover, the conflict between the Illinois ruling here and the decisions of other states has created tremendous confusion and uncertainty as to the constitutional rights and limitations imposed in this arena. The legal uncertainty generated among the States provides adequate grounds for granting the writ here; the human cost of this continued upheaval cries out for direction from this Court.[8]

The citizens of Illinois have just witnessed yet another traumatic removal of a child from the only home he has ever known. At the same time this personal grief is visited upon this individual case, the nation is experiencing

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[8] Unfortunately, Richard's case is anything but an isolated occurrence. Children throughout the country have been the subjects of painful custody disputes between biological parents and would-be adoptive parents. *See, e.g.*, Mark Hansen, *Fears of the Heart*, 80 A.B.A.J. 58 (Nov. 1994) (case of "Baby Emily", a two-year-old whose custody case has been creeping through the Florida appellate courts since her adoption was set aside in June 1994); *In re Adoption of J.J.B.*, No. 21,864, slip op. (N.M. S. Ct. Mar. 30, 1995) (case of four-year-old New Mexico child whose three-and-one-half year custody battle resulted in the New Mexico Supreme Court ordering a resolution based on the child's best interests).

a startling upsurge in births to unmarried women. The number of births out of wedlock has grown at a near exponential rate over the last thirty years, from five percent of all births nationwide to nearly 30 percent, and based on its current trajectory will reach 50 percent by 2003.[9] The number of births to unmarried mothers in 1991 totaled 1.21 million, an 82 percent increase since 1980.[10] Yet, paternity is established for only approximately one-third of the annual births to unmarried women.[11] The number of children in the foster care system nationwide has also ballooned, from 276,000 in 1986 to over 450,000 in 1992, according to the National Council for Adoption and the American Public Welfare Association.[12] Sadly, as the number of children who stand to gain the most from adoption has skyrocketed, the number of children adopted each year has receded. Adoption in America has been precipitously falling over the last two decades, from 90,000 unrelated domestic adoptions in 1970 to less than 53,000 a

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9 Dep't of Health and Human Servs., Admin. for Children and Families, Office of Child Support Servs., *Seventeenth Annual Report to Congress* 3 (1992); David S. Broder, *Illegitimacy: An Unprecedented Catastrophe*, Wash. Post, June 22, 1994, at A21. *See also* U.S. Bureau of the Census, *Statistical Abstract of the United States* 78 (113th ed. 1993). This has grown to nearly double the rate cited by the dissent in *Caban*. *See* 441 U.S. at 402 n.2 (Stevens, J., dissenting).

10 Dep't of Health and Human Servs., Admin. for Children and Families, Office of Child Support Servs., *Seventeenth Annual Report to Congress* 3 (1992).

11 *Id.* at 11.

12 Thomas McArdle, *Exploring the Adoption Option*, Investor's Business Daily, Aug. 4, 1994, at 1.

year today, according to the National Council for Adoption.[13]

Thus, the potential for repeating the tragic circumstances visited upon Richard here is great. The *Giacopelli* court, the Illinois General Assembly and the Governor of this State have acted in an effort to minimize this avoidable anguish by providing procedural protections for all parties. The erroneous decision by the Illinois Supreme Court holding that the federal Constitution denies these protections must be reviewed.

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[13] *Id.* The chilling effect this case will have on adoptions in this country is already a source of commentary and concern. *See, e.g.*, Allen Warren and Louise Kierman, *For Some, Adoption Gets Scary*, Chi. Trib., May 3, 1995, at A1, A10.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court grant the petitions for a writ of certiorari in this case.

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